IN THE

ed States Court of Appeals

FOR THE NINTH CIRCUIT

---

r E. Toor,

Appellant,

vs.

C. Westover,

Appellee.

---

r E. Toor and Florence D. Toor,

Appellants,

vs.

C. Westover,

Appellee.

---

eals From the United States District Court for the Southern District of California.

BRIEF FOR THE APPELLEE.

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TOPICAL INDEX

PAGE

ow 1

.... 1

resented 3

d regulations involved........ 3

.... 4

of argument........ 9

.... 11

I.

rict Court did not err in finding that the taxpayer t enter into a valid partnership with his two minor n for income tax purposes, and therefore all the in- from the business constituted community income able to him and his wife for the taxable years in- 11

II.

ayer was taxable upon the trust income while the were subject to his power to revoke........ 30

.... 37

TABLE OF AUTHORITIES CITED

Cases

Appel v. Smith, 161 F. 2d 121...

Balestrieri, Joe, & Co. v. Commissioner, 177 F. 2d 867.

Barrett v. Commissioner, 185 F. 2d 150.............................

Batman v. Commissioner, 189 F. 2d 107.............................

Burnet v. Leininger, 285 U. S. 136.....................................

Commissioner v. Culbertson, 337 U. S. 733........................
....11, 12, 13, 14, 15
22, 23, 25, 26

Commissioner v. Sunnen, 333 U. S. 591.............................

Commissioner v. Tower, 327 U. S. 280...............................
....11, 13, 14, 15, 22, 23

Culbertson v. Commissioner, decided Aug. 2, 1950........

Daine v. Commissioner, 168 F. 2d 449...............................

Davis v. United States, 176 F. 2d 651.................................

Denison v. Commissioner, 180 F. 2d 938; cert. den., 3
817 ....

Deputy v. duPont, 308 U. S. 488..

Eisenberg v. Commissioner, 161 F. 2d 506; cert. den., 3
767...13

Feldman v. Commissioner, 186 F. 2d 87.............................

Fowler Bros. & Cox v. Commissioner, 138 F. 2d 774....

Gaylord v. Commissioner, 153 F. 2d 408..............................
....12, 18, 27, 30, 31, 32

Giffen v. Commissioner, 190 F. 2d 188..........................15

Grace Bros. v. Commissioner, 173 F. 2d 170.....................

Grant v. Commissioner, 150 F. 2d 915.................................

Greenberger v. Commissioner, 177 F. 2d 990......................

PAGE

ommissioner, 4 T. C. 878 35

ommissioner, 152 F. 2d 722; cert. den., 328 U. S. 838;
len., 328 U. S. 879 21

v. Clifford, 309 U. S. 331 .... 12, 26

v. Eubank, 311 U. S. 122 12

v. Horst, 311 U. S. 112 12

v. Stuart, 317 U. S. 154; rehear. den., 317 U. S. 602 12

mmissioner, 170 F. 2d 531; cert. den., 337 U. S. 956.. 15

ommissioner, 8 T. C. 1091 32

arl, 281 U. S. 111 12

. Commissioner, 327 U. S. 293....11, 13, 14, 15, 22, 23, 36

Commissioner, 183 F. 2d 246 22

Commissioner, 175 F. 2d 555; cert. den., 338 U. S.
.... 15

v. Commissioner, 177 F. 2d 351 15

. Commissioner, 166 F. 2d 703; cert. den. 335 U. S.
.... 15

ommissioner, 174 F. 2d 377 15

merican Packing & Provision Co., 177 F. 2d 538 12

v. Commissioner, aff'd, 174 F. 2d 827; cert. den., 338
0 32

Commissioner, 161 F. 2d 495; cert. den. 332 U. S.
.... 15

Commissioner, 182 F. 2d 345 .... 21, 22

tes v. Gypsum Co., 333 U. S. 364; rehear. den., 333
9 12

tes v. Real Estate Boards, 339 U. S. 485 11

Statutes

Deering, California Civil Code (1949), Sec. 2280............

Internal Revenue Code:

Sec. 11 (26 U.S.C., 1946 Ed., Sec. 11)........................

Sec. 22 (26 U.S.C., 1946 Ed., Sec. 22)........................

Sec. 166 (26 U.S.C., 1946 Ed., Sec. 166) 3,

Sec. 167 (26 U.S.C., 1946 Ed., Sec. 167)....................

Sec. 181 (26 U.S.C., 1946 Ed., Sec. 181)....................

Sec. 182 (26 U.S.C., 1946 Ed., Sec. 182)....................

Sec. 188 (26 U.S.C., 1946 Ed., Sec. 188) ....

Sec. 3797 (26 U.S.C., 1946 Ed., Sec. 3797)...............

Miscellaneous

Federal Rules of Civil Procedure, Rule 52........................

13 George Washington Law Review (1945), p. 121, Pa
nership in Tax Avoidance...

Treasury Regulations 111:

Sec. 29.22 (a)-1...

Sec. 29.22 (a)-21...

No. 12999

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Appellee.

BRIEF FOR THE APPELLEE.

Opinion Below.

inion of the District Court [R. 57-63] is re-
94 Fed. Supp. 860.

Jurisdiction.

ly $104,100[1] in respect of Herbert E. Toor (
called the taxpayer). Such deficiencies (tog
substantially similar assessments asserted agains
Florence D. Toor, for the same taxable years
2)) were duly assessed by the Commissioner
Revenue [R. 7-8, 14, 22-23], and were paid t
lector of Internal Revenue on or about Nov
1948. [R. 9, 10, 17, 25.] Claims for refund
on or about January 15, 1949 [R. 12, 20-21,
were rejected by the Commissioner by regist
dated August 19, 1949. [R. 12-13, 21, 29.]
on October 21, 1949, and within the time p
Section 3772 of the Code, the taxpayer broug
tion (and a similar one in behalf of his wife (A
in the District Court for the recovery of the
interest paid. [R. 3-42.] Jurisdiction was co
the District Court by 28 U. S. C., Section 134
actions, involving identical issues, were conso
trial, without a jury [R. 55-57], in the Dist
[R. 88-89, 499-500.] Judgments for the Coll
entered on January 11, 1951. [R. 79-81.] M
a new trial were filed by the taxpayer and orde

---

[1]The exact net amount involved is not ascertainab
record since the District Court, pursuant to stipulation o
[R. 64-65], made certain allowances to the taxpayers
whereas certain portions of the deficiency assessments

ions were entered on February 6, 1951. [R. Within sixty days thereafter, and on April 5, taxpayers' notices of appeals were filed in each R. 82-84], pursuant to the provisions of 28 Section 1291.[2]

Questions Presented.

hether the District Court erred in finding that d limited partnership entered into between tax- l his two minor children was not valid for fed- ne tax purposes, to the end that all the income business constituted community income charge- he taxpayer and his wife for the taxable years

ernatively—if the first question is answered in native—whether the court below correctly held two trusts created by the taxpayer and his wife nber 20, 1942, for the benefit of their two minor were revocable, and that the amendments thereto ffective on January 13, 1944, and therefore did the original trusts irrevocable as of the date creation.

Statutes and Regulations Involved.

plicable statutes and Regulations are set forth in ndix, *infra*.

urt, pursuant to stipulation of the parties of July 9, 1951, order on August 3, 1951, providing that *Herbert E.*

Statement.

The pertinent facts as found by the Distric[cut off]
respect of the two trusts and the family partn[cut off]
67-69, 70-73] may be summarized as follows:[3]

On November 20, 1942, the taxpayer, as m[cut off]
his marital community's property, entered into
agreements with the Beverly Hills National
Trust Company, as trustee (hereinafter called
or trustee), to create trusts for his two mino[cut off]
Bruce Allan Toor and Barbara Lee Toor (T[cut off]
774 and 775).[4] At the same time, the taxpay[cut off]
bank, as trustee, executed articles of limited p[cut off]
for the sharing of the profits of a furniture m[cut off]
ing business theretofore operated by the taxpa[cut off]
the name of the Furniture Guild of California.
and limited partnership agreements were presen[cut off]
bank by the taxpayer as one package. [R. 70.]

Each trust was in the sum of $10,500. The t[cut off]
authorized to invest the trust funds only in bu[cut off]
which the taxpayer was a partner or principal s[cut off]
or in Government bonds. In each trust deed th[cut off]
reserved the power to remove the trustee and p[cut off]
in its place, without limitation. [R. 70.] Th[cut off]
struments contained no statement that they w[cut off]
vocable by the grantors. It was not until Ja[cut off]

---

[3]The District Court findings in respect of several
pertaining to certain deductions claimed by the taxpa[cut off]
76, pars. 32-40] have been omitted for they were not

: there were executed amendments to the trust
ts which stated that they were not so revocable.
.]

the articles of limited partnership, the taxpayer
red to be a general partner, and the bank as
as declared to be a limited partner. The part-
as not to terminate until 1955, and the interest
ited partner was also stated to be not transfer-
e taxpayer, however, had the right to terminate
gement upon giving a thirty-day notice of in-
dissolve it, and he had the absolute right to
the interest of the limited partner at "book"
he taxpayer, under the partnership agreement,
ull charge and control of the entire business, and
ower and authority to do any act necessary or
t with respect to the business. While under the
: the business profits were to be divided on the
the ratio of one-sixth to each trust and four-
the taxpayer, he nevertheless had the right to
the profits at such times and in such amounts
ermined. [R. 71.]

istee contributed neither independent money nor
uring the existence of the partnership. [R. 71.]

eation of the limited partnership did not change
y the control which the taxpayer exercised over

The control of the business income and the r
its allocation, the salaries to be received by the
and the employees, the amount to be paid for
of the taxpayer's property on which the bus
carried on—in brief, the determination of al
requiring judgment of management, control of
erty, the disposition and allocation of funds der
the business, including amounts to be allocated
were so exclusively under the domination of the
that, to all intents and purposes, the creation of
nership made no change whatever in the manner
the business had been conducted before. [R. 72.

No instance appears where the bank or its r
tives used independent judgment or suggested
other than that proposed by the taxpayer. T
exercised none of the rights of partnership eve
of advice. The trustee did not exercise dom
control over the trust corpus in the business an
influence the conduct of the partnership or the
of its income. [R. 72.]

The nature of the business was such that the
personal services, business judgments and skill
important role in the earning of the business inc
to the extent that capital played a part, becau
control over the corpus and income and his re
so many of the attributes of ownership of the tr

tire effect of the establishment of the partner- merely to permit the taxpayer's children to re- rtain amount of the income when he determined income was subject to distribution rather than to other business determined by him. [R. 72-

xpayer and the trustee did not act with a business n setting up the limited partnership. [R. 73.]

xpayer and the trustee did not in good faith in- in together in the present conduct of the business :. [R. 73.]

e fiscal period November 20, 1942, to June 30, d for the fiscal years ended June 30, 1943, and 1944, the taxpayer caused partnership income ns to be filed in the name of the alleged limited ip, the Furniture Guild of California. As shown, isted of the taxpayer as general partner and the a limited partner. [R. 67.]

: years 1943, 1944 and 1945, the taxpayer and his rence D. Toor, filed federal income tax returns nmunity property basis for each calendar year. uded in those returns, among other income, their stributive shares of the partnership income from iture Guild of California for the partnership's rs ending within their taxable calendar years.

sum to the Collector of Internal Revenue. On
November 15, 1948, as a result of a deficiency a
by the Commissioner of Internal Revenue, the
paid $32,710.48 to the Collector in partial payn
total of $38,639.08 in additional income taxes an
assessed by the Commissioner for the year 1943.

For the year 1944, the taxpayer reported $
due in income taxes, and in due course paid tha
the Collector. On or about November 15, 19
result of a deficiency assessment by the Commiss
taxpayer paid to the Collector $27,344.42 in addi
come taxes and interest for the year 1944. [R.

For the year 1945, the taxpayer reported $
due in income taxes, and in due course paid tha
the Collector. On or about November 15, 19
result of a deficiency assessment by the Commiss
taxpayer paid to the Collector $38,125.80 in addi
come taxes and interest for the year 1945. [R

On or about January 15, 1949, the taxpayer fil
for the refund of the deficiencies, plus interest
him for the taxable years 1943, 1944 and 19
August 19, 1949, the Commissioner rejected suc
[R. 68.] Thereupon the taxpayer brought this
October 21, 1949. [R. 69.]

On the basis of the foregoing facts, the Distr
held that the corporate trustee of the trusts c
the taxpayers for the benefit of their two mino
may not properly be recognized as a limited par
him in the business; and that the trusts were

is case presents simply another attempt to achieve
eallocation of income among an intimate family
rough the instrumentality of a limited partner-
hout effecting any change in property control.
tion is whether, considering all the facts, the
good faith and acting with a business purpose
to join together in the present conduct of a busi-
prise. Under controlling law, this question must
red in the negative. Moreover, upon a proper
tion of the various evidential factors, the District
ind that the taxpayer and his minor children did
into a good-faith partnership recognizable for
x purposes. This finding is substantiated by the
and is therefore not clearly erroneous. Conse-
t should not be disturbed upon appeal.

he childrens' contributions of gift capital to the
ip, as opposed to independent original capital,
show that they thereafter exercised no control
ion whatever over the capital contributed. Such
nce tends to indicate that no real partnership was
Since the gifts were conditioned on reinvestment
rtnership business, they were not complete and
onal, and therefore the partnership is not genuine.
rens' inclusion in the partnership as limited part-
s, when assessed with a view to the other circum-
volved, to indicate that no real partnership was
Similarly, the retention of managerial power
gift capital by the childrens' father likewise indi-

lack of dominion on the part of the children c
alleged property. Moreover, there is shown nc
purpose for the creation of the partnership. Th
er's admitted sole desire to help his children as
reason for forming the partnership is a personal
by no stretch of the imagination a business purp
desire failed because of the incompleteness of th
the children, the taxpayer, at the time of making
still having full power to revest in himself tit
property because the trust instruments were th
able. Finally, the taxpayer was fully aware o
benefits to be derived by including the childr
partnership. Since the evidence shows that the
ject of creating the partnership was to diminish
partnership was ineffective for tax purposes.

2. There is no basis in the record for the t
alternative contention that if the partnership be
then he and his wife should not be held taxab
income of the trusts now attributed and allocat
partnership for the fiscal year ended June 30,
therefore included in their calendar year return
year, under the applicable statute. Such income
to the taxpayer in any event for the year 1943,
applicable statute, because the trusts were revoca
time he transferred property to them, and the
therefore had full power to revest in himself ti

ARGUMENT.

I.

trict Court Did Not Err in Finding That the payer Did Not Enter Into a Valid Partner- With His Two Minor Children for Income Purposes, and Therefore All the Income n the Business Constituted Community In- e Chargeable to Him and His Wife for the able Years Involved.

istrict Court found that a *bona fide* partnership, for federal income tax purposes, was not created the taxpayer, as manager of the marital com- roperty, and his two minor children. This find- ne Supreme Court has held, is purely one of fact, ng the taxpayer's demonstration that it is clearly s, it is conclusive. *Commissioner v. Culbertson,* S. 733; *Commissioner v. Tower,* 327 U. S. 280; *v. Commissioner,* 327 U. S. 293. It was for the Court to weigh and draw its conclusions from vidence, conflicting or otherwise (*United States v Cab Co.,* 338 U. S. 338, 342; *United States Estate Boards,* 339 U. S. 485, 495-496); and so ts findings are supported by the evidence and are n to be clearly erroneous, due regard being given

Procedure; *United States v. Gypsum Co.,* 333 U
395-396, rehearing denied, 333 U. S. 869; *Joe E*
& Co. v. Commissioner, 177 F. 2d 867, 873 (C.
Ruud v. American Packing & Provision Co., 1
538 (C. A. 9th); *Grace Bros. v. Commissioner,*
170 (C. A. 9th)). It is our position that the
has not demonstrated that the District Court's
are clearly erroneous, and, furthermore, that he
so for there is ample evidential support for its

We contend that the facts of this case show
device designed to achieve a paper reallocation
among an intimate family group, without effe
change in the control of the property which pro
income or in the real economic position of th
Moreover, the taxpayer's simultaneous partne
trust agreements were ineffective for income tax
to the end that any of the business income
turned over to the trusts remained taxable to hi
he retained so many of the attributes of owners
trust assets in his business that he must still be
to have created the entire business income, whi
able to him who earns it. *Cf. Lucas v. Earl,*
111; *Burnet v. Leininger,* 285 U. S. 136; *He*
Clifford, 309 U. S. 331; *Helvering v. Horst,*
112; *Helvering v. Eubank,* 311 U. S. 122; *H*
Schaffner, 312 U. S. 579; *Helvering v. Stuart,*
154, rehearing denied, 317 U. S. 602; *Commi*

412-413 (C. A. 9th); *Eisenberg v. Commissioner,* 2d 506, 510-511 (C. A. 3d), certiorari denied, S. 767.[5]

tion of the present case depends in particular principles enunciated by the Supreme Court in *ioner v. Tower, Lusthaus v. Commissioner,* and l more recently in *Commissioner v. Culbertson,* . In the *Culbertson* case, consistent with the of the *Tower* and *Lusthaus* cases, the Supreme ld (p. 742) that in testing the reality of a part-
–

question is * * * whether, considering all facts—the agreement, the conduct of the parties xecution of its provisions, their statements, the mony of disinterested persons, the relationship of parties, their respective abilities and capital con- utions, the actual control of income and the pur- es for which it is used, and any other facts throw-

Partnership in Tax Avoidance, 13 George Washington L. 142-143 (1945):

we would truly orient the subject under discussion, we l recognize that the family partnership problem cannot be ssfully treated as a local disease. Family trusts, family erships, family corporations, are in one sense all the same They all may seek to reduce taxes by splitting, postpon- r otherwise controlling the receipt of taxable income with- substantial surrender of dominion by the person who l otherwise have to pay the tax. They may not change mic status, but merely present different facades. Substan- wnership, business, the operations of daily life, may go on ore. Lawyers who put aside their special interest as advo- and their inherent fondness for legal subtleties, know

> ing light on their true intent—the parties
> faith and acting with a business purpose int
> join together in the present conduct of the er

This question, the Court said (p. 743), is one of
fact for the trial tribunal. While no one circum
conclusive, nevertheless (p. 744)—

> Unquestionably a court's determination
> services contributed by a partner are not "v
> that he has not participated in "management
> trol of the business" or contributed "original
> has the effect of placing a heavy burden on
> payer to show the bona fide intent of the p
> join together as partners. * * *

The Supreme Court also indicated (p. 747) th
family partnerships are subject to special scrutiny
purposes, an intra-family transfer of business cap
render the transferee the true owner and therefo
partner in the tax sense, "if" he exercises active "
and control" over the property, "and through tha
influences the conduct of the partnership and the
tion of its income." Throughout its opinion, the
Court reiterated the principles it had previously en
in the *Tower and Lusthaus* cases, *supra*. The rat
its decisions in all three cases is that the Tax Co
obliged to accord tax effect to a family partne
rangement which produces no substantial chang
creation of the business income, but merely a re
of it within the family, even though the arrang
valid under state law and as to third parties.

t's holding that the husband, through his owner-
of the capital and his management of the busi-
actually created the right to receive and enjoy
ienefit of the income and was thus taxable upon
entire income under Sections 11 and 22(a). In
case, other members of the partnership cannot
onsidered "Individuals carrying on business in
iership" and thus "liable for income tax . . .
ieir individual capacity" within the meaning of
on 181. * * *

inciples laid down by the Supreme Court in the
id *Lusthaus* cases, and reaffirmed in the *Culbert-*
have been applied many times by this Court and
Courts of Appeals. See, e. g., *Giffen v. Com-*
, 190 F. 2d 188 (C. A. 9th); *Nordling v. Com-*
, 166 F. 2d 703 (C. A. 9th), certiorari denied,
. 817; *Batman v. Commissioner,* 189 F. 2d 107
5th), certiorari denied November 13, 1951;
. Commissioner, 189 F. 2d 856 (C. A. 5th);
. *Commissioner,* 161 F. 2d 495 (C. A. 5th),
denied, 332 U. S. 810; *Feldman v. Com-*
, 186 F. 2d 87 (C. A. 4th); *Ritter v. Com-*
, 174 F. 2d 377 (C. A. 4th); *Morrison v.*
oner, 177 F. 2d 351 (C. A. 2d); *Morano v.*
oner, 175 F. 2d 555 (C. A. 3d), certiorari de-
U. S. 904; *Barrett v. Commissioner,* 185 F. 2d
A. 1st); *Denison v. Commissioner,* 180 F. 2d
A. 6th), certiorari denied, 340 U. S. 817; *Appel*
161 F. 2d 121 (C. A. 6th); *Kohl v. Commis-*

Following the foregoing pronouncements
Supreme Court in the *Culbertson* case [R. 58
court below examined the pertinent facts [R. 60
thereupon found that no valid partnership bet
taxpayer and his two minor children had been
[R. 73.] We submit that this ultimate finding
dantly supported by the evidence and is therefo
correct.

In the first place, we think that the issue is
by this Court's recent decision in *Giffen v. Comm*
190 F. 2d. 188, the factual situation of which
stantially on all fours with that here, with in
exceptions. There this Court refused to reco
taxpayer's minor children as real partners,
further that the conditional gifts made to them
taxpayer and his wife did not relieve the dono
liability on the income from the partnership.
payer's wife was appointed guardian of the
property, both the taxpayer and his wife hav
gifts of undivided interests in the property to the
The gifts were expressly conditioned upon their
ment in the limited partnership comprising all t
members. The ten-year limited partnership a
gave the husband full possession and exclusiv
and management of the property, as well as f
to retain all income. The limited partners' inter
not assignable. This Court concluded that the

ut merely contingent interests that might become after ten years. The Court found no business no contribution of services by the children, and capital investments by them. Accordingly, the d not recognize the children as limited partners ifts as valid, and it therefore held that the income property was taxable equally to the taxpayer and

the District Court, in arriving at its conclusion, applied the foregoing principles enunciated by eme Court, this Court and the other Courts of in like or similar situations. Thus, an examina-he District Court's opinion, in the light of those s, discloses that in concluding that no good-faith hip was formed with respect to the taxpayer's it relied upon the following factors: As limited the children were not intended to and never orm any vital services for the business; nor did tribute any independent capital, any new capital vas not previously in the taxpayer's business. ey contributed was given them only upon condition y invest it in the so-called partnership business axpayer, or in Government bonds. The entire of the partnership business and affairs was left in ayer's hands, just as before creation of the part-and the children in no way participated in the nent and control of the business or over the prop-income, which was ostensibly given them. The were not absolute and complete because the con-placed thereon stripped the children of freedom

amendment on January 13, 1944; therefore, it fol
taxpayer never divested himself of the proper
sibly given the children in trust on November 2
and the taxpayer could have revested title in h
any time in the interim. *Gaylord v. Commissio*
F. 2d 408, 414 (C. A. 9th).

Nor could the children, as limited partners,
any interest they had in the partnership [R. 38, 1
and they could sell it only to their father at "boo
[R. 37-38, 62.] Their father alone had complete
and control over the property [R. 37] and the a
and disposition of all the partnership assets and
He could dispose of them at any time he saw fi
before creation of the partnership. He was
powered to terminate the partnership arrangem
thirty days' notice of intention to dissolve and
absolute right to buy out the children's interests
value at any time. [R. 37-38, 62, 71.] While
ness profits were distributable in the ratios pro
the partnership agreement, nevertheless the fathe
sole right to determine whether the partnershi
was to be accumulated or distributed, and at su
and in such amounts as he should determine. [R

While the District Court recognized that limi
ners are restricted in the extent of their par
in partnership affairs, it pointed out that the ta
children never exercised *any* of the rights of
partner, such as voice in the management and di
of the partnership property and the income t
[R. 61-62], and at no time contributed anythi

of the partnership income. [R. 71-72.][6] More-
children are not shown to have enjoyed much
ruits of their supposed investment of $10,000
ond the sums paid for the trustee's administration
and income taxes. [R. 189, 288.] The record
iat the taxpayer, with ample resources (cash
rities) available for the purposes, actually made
ribution" of partnership profits to any of the
uring the first period from the inception of the
iip in November, 1942, to the end of its first
ır on June 30, 1943. [R. 412; R. 419, Ex. J.]
er, he distributed to each trust, in excess of the
necessary to pay the trust fees and income
ly $1,295 up to June 30, 1944 [R. 415; R. 419,
56,822 up to June 30, 1945 [R. 416; R. 421, Ex.
a distribution of only $7,500 for each trust, out
the trustee had to pay more than $6,100 for taxes
, up to the year ended June 30, 1946 [R. 419,
. 420, Ex. K.] On the latter date *after the tax-
rs,* however, he distributed sums in excess of
to each trust [R. 419, Ex. J], one month before
ferred the partnership business to a corporation he
n exchange for its stock [R. 184-189, 196, Exs.
6; R. 419, 421, Exs. J and L; R. 498-499.] The
, having complete and exclusive power of alloca-
disposition of the income from the business, in-

connection, we submit that the fact that the children were
nly as *limited* partners without possibility of contribution
ident capital for, as shown, it still belonged to the tax-

cluding any amounts allocated as profits for ea
[R. 36], used most of the income in his business
sequently little for the childrens' trusts. [R. 4
417.]

The taxpayer did intend to make provision
children for the future by transferring property
for their benefit [R. 103, 117-127, 190], provid
ever, that the trustee should become a limited
and invest the trust corpus in the business, or in
ment bonds. [R. 118-119, 370.] This was acco
by the creation of the trusts and formation of t
nership on the same day, as part of a single pl
30-42, 70; R. 106, Ex. 2; R. 317-320.] The
however, was not given any opportunity to in
corpus of the trust in Government bonds for the b
given the gift in trust together with the partnersh
ment, both "as one package." [R. 70, 370-371.]
the same time, the taxpayer, in making the t
limited partner, retained full control over the ent
ness property and income, including the trust in
to the exclusion of the bank and all others. [R.
A, par. Eighth; R. 481-485.] He made doubl
of this by retaining the power to substitute
trustee, not excluding himself, or to discharge the
trustee at any time, if necessary, for reasons of
[R. 122-123, Ex. 4, par. Ninth.]

e taxpayer testified that he could recall no such [R. 289.] A business purpose behind the for- a partnership is required, however, by *Commis- Culbertson,* 337 U. S. 733. Contrary to the al- iness purpose claimed by the taxpayer now (Br. ne District Court found [R. 73] that the taxpayer rustee did not act with a business purpose in set- ne partnership. The taxpayer himself testified [R. : he could not recall anything about when they nto this agreement, [as to] how the limited part- vould benefit the business, in any way," or that any "purpose in entering into this agreement, of the business in any way." To determine what is l by the requirement of a business purpose re- tle definition. The words and the requirement . Does the transaction serve the business, or relation to it? *Slifka v. Commissioner,* 182 F. C. A. 2d); *Gregory v. Helvering,* 293 U. S. 465, The so-called partnership transaction herein erve the business in any respect; the taxpayer's went on, just as before, completely in the hands ame proprietor. The taxpayer's "sole purpose" ake care of the children," as he testified [R. 190], ough laudable, is a *personal* purpose—not a busi- ose by any stretch of the imagination. *Hash v. ioner,* 152 F. 2d 722 (C. A. 4th), certiorari

that the taxpayer was aware of the tax benef
derived by himself upon including the childre
partnership, and that "the conclusion is warrante
sole object was to diminish tax liability" thereby
v. Commissioner, supra, p. 346. As *Miller v.*
sioner, 183 F. 2d 246, 254 (C. A. 6th), demands
examine the transaction to see if any benefit
the business. Clearly, in the present case, no su
is shown to have resulted to the business by the
of the children in the partnership. Nor did the
of the partnership *add* anything to the taxpayer's
or make any change in any way in the manner
he had conducted it before. [R. 61, 71.]

Upon all these considerations rests the Distric
ultimate finding that there was no intention to
real good-faith partnership between the taxpaye
minor children to join together in the present c
the business enterprise. [R. 73.] *Commissione*
bertson, supra. We submit that the factors con
as to which there can be no dispute—are ample
the District Court's conclusion and, as shown,
as the Supreme Court indicated in the *Tower,*
and *Culbertson* cases should be considered in
the issue before it.

In the light of the foregoing, we submit that
trict Court's decision is unassailable. The taxpa
ever, argues incongruously that there is "no" ev
support nine of the District Court's primary fi
fact from which it drew its ultimate finding [
that the taxpayer and the trustee did not in

ip for income tax purposes.[7] (Br. 20-44.) We
ady shown, however, that most of the indicia of
tnership recognizable for tax purposes, as ruled
ipreme Court in the *Tower, Lusthaus* and *Cul-*
ises, are absent here. The taxpayer relies on the
cial's testimony [R. 376]—that he understood
children "actually" entered into the partnership
ever benefits they might derive through the trusts
partnership business—as a criterion of the good-
tnership. (Br. 20-21.) In refutation thereof,
the trustee's representative also testified [R.
answer to the question whether it was "your
at the time you entered into this agreement to
irry on the furniture business with Mr. Toor
make an investment in this business," that "It
estment"; also [R. 371], as to whether "you did
ove specifically * * * the entry into the
ip, but regarded the partnership investment as
al asset of the company, accepted by your trust
" he replied that "It was considered * * *
ackage." This, we think, disposes of the con-
at the children contributed capital to the partner-
43), for the court below found that the trustee

e given by the taxpayer as being present here in support
entions, as follows: business purpose in the formation of
ship; contribution of capital; the rights of the bank-
limited partner (Br. 42) "at all times * * * to exercise
es of ownership and the rights of a limited partner with
he partnership business and its assets, and to receive its
te share of profits as fixed by the agreement"; substan-
in the economic relationship of the taxpayers and their

contributed neither independent money nor servic
[R. 71], and the evidence shows, in harmony
that the funds put into the partnership by the
trusts were admittedly merely "an investment."
Whatever weight may be given to the children
contribution as a factor, therefore, is negatived
by the fact that their gift-property still belong
taxpayer, as shown, but also by virtue of the
retention of absolute dominion and control over
ness and the income thereof, to the end that *he*
be considered as the real earner of all the busine
as the court below found. [R. 72.]

The taxpayer argues (Br. 28-30), in effect
District Court, in finding no contribution of the
loses sight of the fact that they could make but
tribution because of their status as limited par
states that the trustee, recognizing the restr
respect of limited partners under California l
exercised its rights to which it was entitled be
management of the partnership business being
in the hands of the taxpayer, they never felt c
to do so. (Br. 28-30.) As we have suggest
the mere fact that the children were taken i
limited partners tends to indicate that they w
be members of a good-faith partnership. See fn
If, because they are limited partners, they are t
contribution whatsoever save their nebulous c
of capital, then we submit that in view of the
their capital contribution, they have contribute
and therefore cannot be considered partners in

that income must be taxed to him who earns *missioner v. Culbertson,* 337 U. S. 733, 739-740. , by itself, the right of the general partner to at will the interest of the limited partners may ate that no real partnership has been created, urt below noted this provision of the partnership t only as one of the many factors spread before 2, 71.] In combination, however, with the total minion in the children over their so-called capital on [R. 71-72], we submit that the provision for by the managing partner is confirmatory of the Court's ultimate conclusion [R. 73] as to the of *bona fides* of the partnership arrangement. *United States,* 176 F. 2d 651 (C. A. 6th).

ttled that the alleged partners must make some on, either of labor or capital, for if they con- othing it can hardly be contended that they are ly responsible for the production of the partner- me. *Commissioner v. Culbertson, supra,* pp. Although the Court in the *Culbertson* case d that a donee of intra-family capital could partner through investment of that capital, the limited this recognition by stating (p. 747):

> ie donee of property who then invests in the y partnership exercises dominion and control that property—and through that control influ- the conduct of the partnership and the disposi- of its income—he may well be a true partner. ther he is free to, and does, enjoy the fruits of artnership is strongly indicative of the reality of

receives any of the fruits of the partnership, su
strongly indicate that there was no real partners
is precisely the situation here. Whether there
pation in management and control is a question
importance, just as the contribution of capital an
may be. *Commissioner v. Culbertson, supra,* p.
same is true as to whether the alleged partne
any of the fruits of the business.

As the decisions recognize, if a family part
bottomed upon gift capital, as here, there m
completed gift. That gift must also be unc
Commissioner v. Tower, 327 U. S. 280; *Gree*
Commissioner, 177 F. 2d 990 (C. A. 7th); *Cul*
Commissioner, decided August 2, 1950 (1950 F
Memorandum Decisions, par. 50,187), pending
Court of Appeals for the Fifth Circuit. The
apparently disregards the condition imposed upo
to the children here, but the condition is i
There was to be no gift unless it was reinves
alleged partnership. [R. 70.] The entire capi
children was encumbered with that obligation.
capital base cannot, we submit, bottom a *bona*
nership, certainly not when it is the sole contr
the children. The Tax Court refused to recogn
tribution of gift capital in the *Tower* case, *supr*
the husband-taxpayer there gave capital to his
the condition that she reinvest it in the business.
clusion of fact was affirmed by the Supreme Cou
the controls are retained by the grantor under

Commissioner, 153 F. 2d 408, 412-413 (C. A.
Section 29.22(a)-21 of Treasury Regulations
ulgated under the Internal Revenue Code. In
v. Commissioner, 161 F. 2d 506 (C. A. 3d),
denied, 332 U. S. 767, the court stated (pp.

: Tax Court in this case evidently concluded
he gifts in trust were not complete. We do not
e how large a "bundle of rights" the petitioners
eld; it is sufficient that the rights retained en-
them to make distributions to the minor bene-
es according to their discretion, and to continue
both the corpus and the income of the trusts in
rtnership business exactly as though they were
vners thereof, without right in the beneficiaries
eive any distribution until the termination of the
as hereinbefore mentioned. Petitioners contend
hey could have prevented distribution of income
: trusts only by denying distribution to them-
. The effectiveness of this argument may be
d in the light of the fact that under the terms
e partnership agreement, to which the trusts
subservient, petitioners could adjust their sal-
as they saw fit and siphon off all net income
y by executing a written agreement on or be-
he first of each year.

ne taxpayer contends that once the partnership
lished all the benefits possible went into the
neither the taxpayer nor his wife benefited from
: earned by and contributed thereto. (Br. 44.)
below found, however, that the effect of the

subject to distribution rather than to diversio
business as determined by him. [R. 72-73.]
the record shows that the partnership profits
"distributed at such time, and in such amounts,
from time to time, determined" solely as the
might see fit [R. 36], and that he had full
authority if, as and when "convenient * *
limitation" to do so, except only as circumscri
laws pertaining to limited partnerships. [R.
shown, the children enjoyed very little real ben
large profits of the partnership, over and
amounts of the bank-trustee's administration c
maintaining the trusts, as well as to pay th
taxes. [R. 189, 412, 415, 416; R. 419, Ex. J
taxpayer testified [R. 288], contrary to his pre
ment (Br. 44), "I don't think we distributed
come" due the trusts during the taxable years.
sioner v. Culbertson, supra, p. 747.

Finally, the taxpayer contends that the forma
partnership effected a substantial change in th
relationship of the taxpayers and their childr
income in question. (Br. 43.) The court be
[R. 72-73], however, that the creation of the
changed in no way the taxpayer's absolute co
cised over the business, or the manner in whic
ness had been conducted by him before the
was formed [R. 61, 72], and that the only diff
that it permitted the children to receive *so*
whenever the taxpayer might decide that there

ıent, during the taxable years at least [R. 189,
415, 416; R. 419, Ex. J], and only as he saw
72-73.] As the court below found [R. 72],
e extent that capital played a part in the busi-
rtheless because of all these things the taxpayer
st still be considered to have created the entire
ncome." *Cf. Commissioner v. Sunnen,* 333 U.
)4-606, where the Court pointed out that the
; not whether the taxpayer actually receives in-
:h he provides for his children and members of
· group but that the crucial question is "whether
or retains sufficient power and control over the
ıroperty or over receipt of the income to make it
: to treat him as the recipient of the income
ırposes * * *, the receipt of income by the as-
:ely being the fruition of the assignor's economic

ımit that the foregoing effectively negatives the
final argument that the proper application to
here of the principles governing the validity of
rtnerships as enunciated by the Supreme Court
ver and *Culbertson* cases, allegedly indicates that
sion of the court below as to the validity of the
partnership, is contrary to law. (Br. 45-54.)
that contention appears wholly concluded by
's decision in *Giffen v. Commissioner,* 190 F. 2d
ı, as heretofore shown, involves almost an iden-

II.

The Taxpayer Was Taxable Upon the Tru[s] While the Trusts Were Subject to His Revoke.

Alternatively, in the event this Court shoul[d] taxpayer's partnership to be valid for tax pu[r] taxpayer contends further that the trustors an[d] tee intended the original trust instruments to revocable trusts on November 20, 1942, but that of a clerical error the irrevocability clause wa[s] tently omitted therefrom as drawn up on that that thereupon the parties corrected the mista[k] tively by confirmatory documents executed on 14, 1943, so that the trusts should be conside[r] cable from their inception; hence, he urges th[at] his wife should not be held taxable on the inc[o] trusts now attributed and allocated to the part[n] the fiscal year ended June 30, 1943. (Br. 55-[

The District Court, upon ruling that the part[n] tity was not effective for tax purposes, held f[62-63] that—

> the trust as originally created was revoca[b] amendment to the instrument which becan[on January 13, 1944 could not be retro[the past so as to make the original inst[revocable as of the date of the trust's cre[a] tax purposes we must take the instrume[n] ten, and as stated at the trial, we can no[action into an action to reform an instru[*Gaylord v. Commissioner*, C. A. 9, 1946, 1

:ord shows that the trusts, as originally exe-
itained no provision making them irrevocable
17-127]; hence, the taxpayer had the power to
:m, under California law. Section 2280, Deer-
ornia Civil Code (1949) (Appendix, *infra*);
. *Commissioner,* 153 F. 2d 408, 412-413 (C. A.
e record also shows that by the instrument
ember 14, 1943, but not notarized by the trus-
anuary 13, 1944, the trusts were made irrevoca-
latter date. [R. 176-180, Ex. 14.] The rea-
e discrepancy in the dates is not clear but since
ver introduced no testimony to explain it, it must
ed that he drew up and signed the document on
· date, and thereupon sent it to the trustee who
xecute it until the later date, as shown herein-
ius, the trustee quite clearly did not approve the
it to the trust instruments until January 13,
l. 177, 179.]

166 of the Internal Revenue Code (Appendix,
ovides that where at any time the power to revest
.ntor title to any part of the corpus is vested in
r, either alone or in conjunction with any person
; a substantial adverse interest in the disposition
rpus or income, then the income from such part
st shall be included in the grantor's net income.
spective of the taxpayer's arguments to the con-
income from such trusts was taxable to him.

er, whatever the intention of the parties, the
it could not have retroactive effect as far as

exercise it. *Gaylord v. Commissioner, supra,* pp
Krag v. Commisisoner, 8 T. C. 1091. *Cf. Ei*
Commissioner, 161 F. 2d 506, 510 (C. A. 3d),
denied, 332 U. S. 767; *Daine v. Commissioner,*
449 (C. A. 2d). This reinforces our earlier
that it was the property of which the taxpaye
divested himself of control at the time of the g
he put into the partnership in behalf of the tru
clearly, the trustee did not have, even technic
legal instant, the true ownership of the assets
was required to put into the partnership busi
Schaeffer v. Commissioner, decided September
(1948 P-H T. C. Memorandum Decisions, par
affirmed *per curiam,* 174 F. 2d 827 (C. A. 3d),
denied, 338 U. S. 910. In any event, any inco
earned by the trustee as a partner with the taxpa
be taxable to the taxpayer only to the extent it w
prior to January 13, 1944 [R. 62-63, 70-71],
hereinafter.

The taxpayer argues further that even if th
13, 1944, amendment to the original trust instr
November 20, 1942, is not given retroactive eff
theless correction of the alleged clerical error w
by the amendatory documents executed on Dec
1943, rather than on January 13, 1944, when
signed the instrument, as the court below foun
63], and since that was within the taxable cale
1943 of the taxpayer and his wife as well as of
the partnership net income for the fiscal year e
30, 1943, would under Section 188 of the Inte

ntity of the trusts or the partnership be disre-
e income accrued to the trusts from the partner-
e close of the latter's taxable fiscal year ended
943, should be included in the taxpayers' taxable
. December 31, 1943, in computing their taxable
: for that year, under the provisions of Section
hat since their tax liabilities did not accrue until
ay of their taxable year 1943, and the alleged
or was corrected by the amendatory documents
y them on December 14th of that year, the tax-
grantors, were not required to include, in com-
ir net income for 1943, the income of the trusts
ear, even assuming that the trusts be held re-
until December 14, 1943. (Br. 61-64.) This
applies only to the taxpayers' calendar year
the partnership's fiscal year ended June 30, 1943,
other taxable years involved here. (Br. 65.)

s no basis in the record for these contentions.
ict Court found [R. 70-71] that the trust in-
contained no statement that they were not re-
the grantors, and that it was not until January
that there were executed amendments to the
uments which stated that they were not so re-
In harmony therewith, it concluded correctly that
al trusts created on November 20, 1942, simul-
with the partnership agreement, were revocable
xecution of the amendments thereto on January
which was the effective date for the irrevocability
sts, and that date could not be retrojected into

415 (C. A. 9th). Contrary to the taxpayer's
(Br. 61), the record clearly supports the Distri
finding and decision to such effect for it show
tionably [R. 176-180, Ex. 14] that the amendato
ments were signed first by only the taxpayer an
as attested by notary public Natalie Holbrook,
ber 14, 1943 [R. 178-179, 180], and that, fo
undisclosed, they plainly were not accepted, ack
and signed by the trustee-bank officials, as attes
tary public Pauline Hudson, until January 13,
177, 179.] Further support is found for this in
nal declaration of trust [R. 117-127, Ex. 4]
taxpayer and his wife *and* the trustee all sign
strument *on the same day,* as attested by the no
[R. 125-127], just as they (except the taxpay
did in the case of the partnership agreement
Ex. A] which was executed on the same day a
agreements. [R. 40-41.] Moreover, the tax
nishes no evidence whatever, other than his
ments, to the contrary, and we have been able to
in the record. Certainly the taxpayer's bald st
a "fact" that the officers of the bank merely ack
before the notary, on January 13, 1944, their
allegedly affixed to the instruments at an earlie
have no probative value here, and in the abse
other evidence more convincing to the contrary
as the court below held [R. 63], accept the orig
ments, as written, for tax purposes.

In these circumstances, it is clear that, unde
laid down by this Court in *Gaylord v. Commissi*

the taxpayer-grantors of liability under Section
Internal Revenue Code for federal taxes on the
the trusts for the taxable year 1943. Hence, it
nat the District Court properly sustained the
oner's computations of the taxpayers' tax lia-
the taxable year in question by using the part-
proper fiscal year accounting basis in determin-
taxable net income.[8] [R. 67-68.] Section 188
ernal Revenue Code; *Gaylord v. Commissioner,*
415; *Fowler Bros. & Cox v. Commissioner,* 138
(C. A. 6th); *cf. Hash v. Commissioner,* 4 T. C.
ned, 152 F. 2d 722 (C. A. 4th), certiorari de-
U. S. 838, rehearing denied, 328 U. S. 879.
contrary to the taxpayer's claim (Br. 64), the
ing gift tax returns on the basis of irrevocable
not change the nature of the trusts and could
t the effect and application of the federal tax
more than could the Government's accepting re-
of funds in the renegotiation of war contracts
isis of the partnership's fiscal year accounting
Gaylord v. Commissioner, supra, p. 415.

urt's decision in *Giffen v. Commissioner,* 190 F. 2d 188,
shable in respect of this issue. There the fiscal year of
ship between the calendar-year taxpayer and his wife,
om transmuting their community property into property
ants in common and operating it under the partnership

As to the many cases cited by the taxpayer (B
34, 39, 40, 48), the District Court distinguishe
the principal ones (*Harris v. Commissioner,* 1
444 (C. A. 9th); *Greenberger v. Commissione*
2d 990 (C. A. 7th)) relied on by the taxpaye
Harris case, this Court merely reversed *per cu*
remanded to the Tax Court to make findings re
the *Culbertson* decision, but expressed no opin
the merits of the case. While we think that th
in the *Greenberger* case is wrong, as being co
the proper application of the rationale of the C
case, the facts there were more favorable towa
lishing a valid partnership than here. In any ev
the *Tower, Lusthaus* and *Culbertson* cases laid
controlling law to the effect that the parties mus
intent *to carry on the business as partners* as
divide the income, the other cases cited by the
lead to no different result for they involved
factual situations. As stated in *Eisenberg v.*
sioner, 161 F. 2d 506, 510 (C. A. 3d), certior
332 U. S. 767:

> Little can be accomplished toward ultim
> mination of the tax responsibility, at lea
> class of cases, by ferreting out analogous
> other cases, particularly since "no one fa
> sive." It is well-settled that the Tax Cou
> mination, if supported by the facts, is
> That we would not be inclined to draw the
> clusions or make the same inferences is
> nificance whatever. * * *

Conclusion.

gment of the District Court is correct and should be affirmed.

Respectfully submitted,

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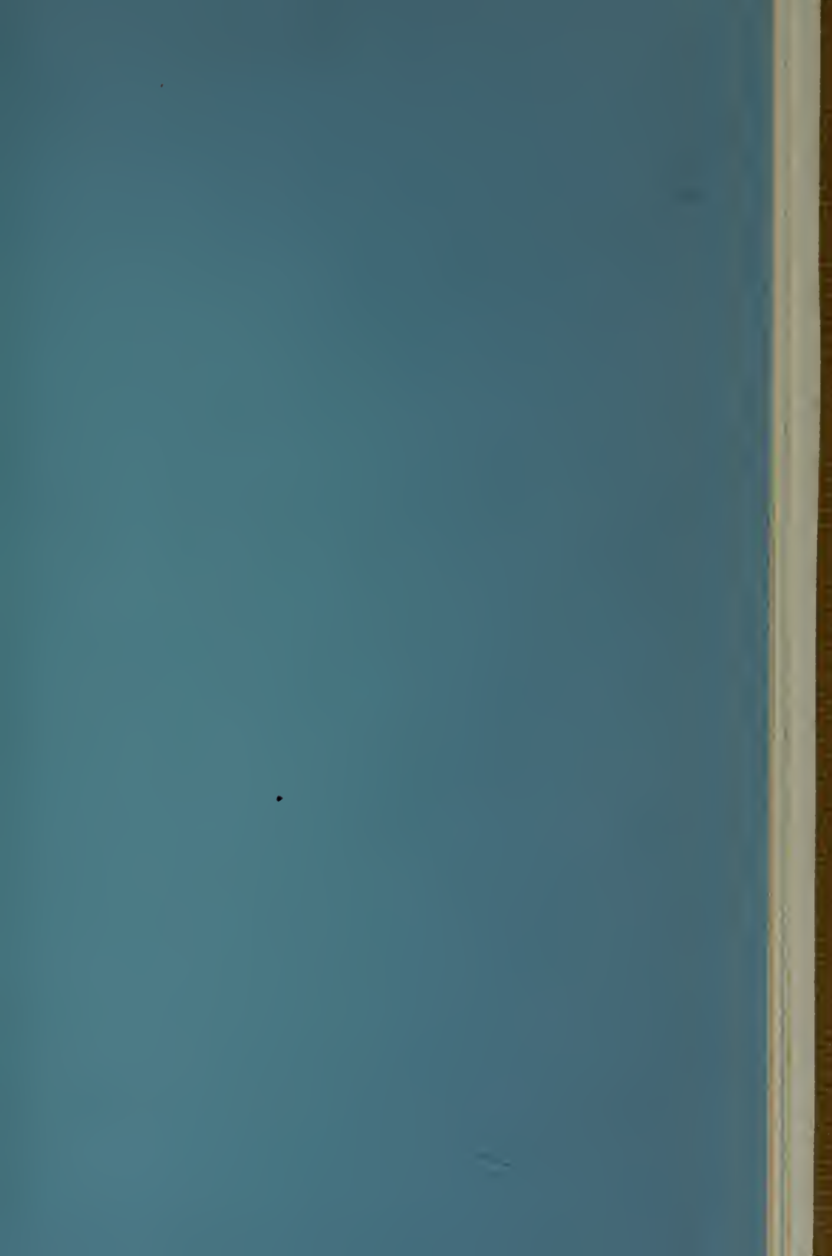
tant United States Attorney.

, 1951.



Revenue Code:

11. Normal Tax on Individuals.

ere shall be levied, collected, and paid for each le year upon the net income of every individual mal tax * * *

J. S. C. 1946 ed., Sec. 11.)

22. Gross Income.

) *General Definition.*—"Gross income" includes , profits, and income derived from salaries, s, or compensaiton for personal service, of whatkind and in whatever form paid, or from prons, vocations, trades, businesses, commerce, or or dealings in property, whether real or per- growing out of the ownership or use of or st in such property; also from interest, rent, ends, securities, or the transaction of any busicarried on for gain or profit, or gains or profits ncome derived from any source whatever. * * *

J. S. C. 1946 ed., Sec. 22.)

166. Revocable Trusts.

nere at any time the power to revest in the or title to any part of the corpus of the trust ted—

1) in the grantor, either alone or in conjunc-

then the income of such part of the trust
cluded in computing the net income of th

* * * * * * *

(26 U. S. C. 1946 ed., Sec. 166.)

SEC. 167. INCOME FOR BENEFIT OF GRA

(a) Where any part of the income of a

(1) is, or in the discretion of the
of any person not having a substantial
terest in the disposition of such part of
may be, held or accumulated for future
to the grantor; or

(2) may, in the discretion of the gra
any person not having a substantial ad
est in the disposition of such part of
be distributed to the grantor; or

* * * * *

then such part of the income of the trust
cluded in computing the net income of th

* * * * *

(26 U. S. C. 1946 ed., Sec. 167.)

SEC. 181. PARTNERSHIP NOT TAXABLE.

Individuals carrying on business in
shall be liable for income tax only in thei

182. TAX OF PARTNERS.

computing the net income of each partner, he
include, whether or not distribution is made to
.

*   *   *   *   *

His distributive share of the ordinary net in-
or the ordinary net loss of the partnership,
uted as provided in section 183 (b).

J. S. C. 1946 ed., Sec. 182.)

188. DIFFERENT TAXABLE YEARS OF PARTNER AND PARTNERSHIP.

the taxable year of a partner is different from
f the partnership, the inclusions with respect to
et income of the partnership, in computing the
come of the partner for his taxable year, shall
sed upon the net income of the partnership for
axable year of the partnership (whether begin-
on, before, or after January 1, 1939) ending
n or with the taxable year of the partner.

J. S. C. 1946 ed., Sec. 188.)

3797. DEFINITIONS.

When used in this title, where not otherwise
ctly expressed or manifestly incompatible with
tent thereof—

*   *   *   *   *

Partnership and Partner.—The term "part-

tion, or venture is carried on, and which is
the meaning of this title, a trust or estat
poration; and the term "partner" includes
in such a syndicate, group, pool, joint ven
ganization.

*   *   *   *   *

(26 U. S. C. 1946 ed., Sec. 3797.)

Deering, California Civil Code (1949):

Sec. 2280. Unless expressly made irr
the instrument creating the trust, every
trust shall be revocable by the trustor by w
with the trustee. * * *

Treasury Regulations 111, promulgated un
ternal Revenue Code:

Sec. 29.22 (a)-1. *What Included in*
come.—Gross income includes in general
tion for personal and professional servic
income, profits from sales of and dealin
erty, interest, rent, dividends, and gains,
income derived from any source whatever
empt from tax by law. (See sections 2
116.) In general, income is the gain de
capital, from labor, or from both combin

*   *   *   *   *